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Aug. 7, 2008

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer Decision

Name of Case: Personnel Security Hearing

Date of Filing: December 13, 2007

Case Number: TSO-0587

This Decision concerns the eligibility of XXXXXXXXXXXX (the Individual) to retain his access authorization.^{1/} The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the Individual is eligible for access authorization. After reviewing the evidence before me, I find that the Individual's suspended access authorization should not be restored.

I. Background

This administrative review proceeding began when a Department of Energy (DOE) Office, suspended the Individual's access authorization based upon derogatory information in its possession that created substantial doubt pertaining to his continued eligibility. In accordance with 10 C.F.R. § 710.21, the DOE Office subsequently issued a Notification Letter that included a statement of the derogatory information causing the security concern.

The security concerns cited in the Letter involve the Individual's false statements regarding his marijuana use during high school made in two contexts: (1) on two Questionnaires for Security Position (QNSP), one in December 2005 and the other in May 2007, and (2) to an Office of Personnel Management (OPM) investigator in June 2007. The Individual denied his drug use orally to the OPM investigator and in writing on his two security forms. According to the Notification Letter,

^{1/} Access authorization (or security clearance) is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5(a).

these three instances of making false statements constitute derogatory information under 10 C.F.R. § 710.8(f) (hereinafter Criterion F).^{2/}

The Notification Letter informed the Individual that he was entitled to a hearing before a Hearing Officer, in order to respond to the information contained in that letter. Upon receipt of the Notification Letter, the Individual requested a hearing, and that request was forwarded to the Office of Hearings and Appeals (OHA). The OHA Director appointed me the Hearing Officer in this matter, and I conducted a hearing in this case in accordance with 10 C.F.R. § 710.25(e) and (g).

At the hearing, the Individual was represented by an attorney. The Individual testified on his own behalf, and presented the testimony of his stepmother; two friends, one of whom is also a co-worker; five previous and present supervisors; and a co-worker, who is also a member of the armed services. The Individual entered one exhibit into the record. The DOE Counsel presented no witnesses, but entered nine exhibits into the record.

II. The Hearing Testimony

A. The Individual

The Individual testified that he lied on the QNSP about his high school marijuana usage because he was afraid that he would not be hired. Tr. at 125. He used marijuana occasionally during high school from approximately 1997 through 2001. Tr. at 137. He completed his first QNSP in 2005 for the Department of Defense (DOD) as if it was an employment application, not

^{2/} Criterion F refers to information indicating that an individual “deliberately misrepresented, falsified, or omitted significant information from a Personnel Security Questionnaire, a Questionnaire for Sensitive (or National Security) Positions, a personnel qualifications statement, a personnel security interview, written or oral statements made in response to official inquiry on a matter that is relevant to a determination regarding eligibility for DOE access authorization.” 10 C.F.R. § 710.8(f). Guideline E of the Adjudicative Guidelines issued by the White House on December 29, 2005, sets forth the security concern that corresponds with Criterion F. Specifically, Guideline E states as a security concern: “the deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.” Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (issued on December 29, 2005, by the Assistant to the President for National Security Affairs, The White House) (The Adjudicative Guidelines), Guideline E ¶ 16(a).

considering the ramifications of lying on it. Tr. at 138-39. He maintained his falsification on the second QNSP in 2007 for the DOE and to the OPM investigator because he was still concerned about remaining employed. Tr. at 127. He said that his discussion with the OPM investigator made him realize that not telling the truth about his drug usage was an issue of integrity. Tr. at 125. The day after his interview^{3/} with the OPM investigator, the Individual called that investigator to tell him that he had falsified the information regarding his drug usage. Tr. at 129. The Individual stated that, even with everything that has happened to him as a result of his honesty, he would still admit to the OPM investigator that he lied on his QNSP. Tr. at 124. He believes telling the truth about his drug usage was the right thing to do. Tr. at 124. The Individual testified that he was not concerned that other people might tell the OPM investigator that the Individual has used drugs in the past, although that was in the back of his mind. Tr. at 150.

B. The Individual's Step-Mother

The Individual's step-mother testified that she has known the Individual for five-and-a-half years. Tr. at 17. He had already graduated from high school by the time she met him. Tr. at 18. They get together at least once a week. Tr. at 18. The entire time she has known him, the Individual has wanted to work for the DOE. Tr. at 20. She testified that he told his family about lying on his QNSP. Tr. at 24. She stated that the Individual is a

very thoughtful, helpful young man. He would do anything for anyone. . . .

[I]f he does have something to do and we ask him [to help us], he'll change his plans.

When we go out of town, he has a 17-year-old sister, and we choose [the Individual] to come out and stay with her while we're gone and look over the house and the wells when we're farming and the animals and things like that.

So he's the one that we choose to do all that, because we trust him and we know that he's going to do what we ask him to do. And

^{3/} The OPM investigator's notes indicate that he received the call two days after the interview. DOE Ex. 9 at 55. The Individual testified that he called the OPM investigator the day after the interview but was not interviewed by him until two days after the interview. Tr. at 149.

after that, he'll call and check in with us and tell us what's going on, what [his sister] has been doing, what time she got home.

So he's really a responsible young man and trustworthy.

Tr. at 25-26. His step-mother testified that she believes he wanted the job "so bad that - it's automatically assumed that you're not going to get that job because you have smoked marijuana . . . [so] most people would not put that on their application." Tr. at 27. She said that he has learned his lesson about falsifying information on his QNSP. Tr. at 27.

C. His Two Friends

The first friend testified that he and the Individual have been friends since the Individual was in third grade and the friend was in second grade. Tr. at 32. The friend and the Individual started working at the DOE the same day. Tr. at 33. Prior to being hired by the DOE, the friend would see him once or twice a month. Tr. at 32. They went through training together and car pooled together. Tr. at 33. The friend was not surprised that the Individual would call the OPM investigator to tell the truth. Tr. at 37. He was impressed that the Individual told the truth. Tr. at 38. He has no concerns about the Individual's honesty or integrity and would be happy to work alongside him, if the Individual's access authorization were reinstated. Tr. at 39-40.

The second friend testified that she has known the Individual since May 2004. Tr. at 113. At that time, the Individual's girlfriend lived in the same apartment building as the second friend and her husband. Tr. at 114. They talk every couple of weeks and see each other about once a month. Tr. at 114. She testified that the Individual is a very honest, caring, and giving person. Tr. at 118.

D. The Individual's Supervisors.

1. Previous Employment Supervisors

The first supervisor testified that he has maintained irregular contact with the Individual since he left his employ in December 2005. Tr. at 46-47. At the end of his employment, he was in a position that led him to be responsible for expensive equipment and for working independently. Tr. at 48. The Individual was responsible and trustworthy. Tr. at 48. Employees in the Individual's previous job have a lot of freedom. Tr. at 50. Some employees, when they make a mistake, will try to conceal the mistake. The Individual always admitted a mistake to his supervisors. Tr. at 50. The supervisor had no reason to doubt his judgment, honesty, or trustworthiness. Tr. at 50.

The second supervisor testified that he hired the Individual in 2005. Tr. at 66. The Individual was an "outstanding" employee. Tr. at 67. He was reliable, prompt, in uniform, properly groomed, alert, and willing to participate actively at work. Tr. at 67. He presently talks to the Individual six or eight times a year and sees him socially twice a year. Tr. at 68. The supervisor stated that he was initially surprised that there was some falsification, but then on the other hand, I wasn't at all surprised that he would come back and say, you know, "I cannot live with this inaccuracy."

It is typical of his character, in my opinion, that he would come back. What I'm not surprised is a guy like him would say, "this is not right and I need to make it right, I need to clarify the record."

It shows a great deal of integrity in my mind that he would say, you know, that . . . he's learning, . . . , he has a lot of honor.

So I was surprised with the initial inaccuracies that he put on there. On the other hand, I'm not at all surprised that he—that his character would be one to stand up and say, "Hey, I've got to make this accurate."

Tr. at 69-70. The supervisor testified that he believes the Individual lied about his drug usage because "he had a lack of understanding of the clearance process, and . . . he believed that if he answered truthfully at that time, it would affect him negatively in the consideration of being granted a clearance, which is a requirement of our job here." Tr. at 75.

The third supervisor testified that he met the Individual in 1999 or 2000, when he began supervising the Individual in his job. Tr. at 92. At the time, the Individual was in his late teens. Tr. at 92. The Individual worked his way up at the employment by proving his responsibility and work ethic. Tr. at 93. The Individual was trustworthy, and the supervisor would hire him again. Tr. at 95.

2. Current Employment Supervisors

The first supervisor testified that the Individual was assigned to work in his department in September 2007. Tr. at 54. The supervisor testified that the Individual performed his job very well. Tr. at 55. They would give him a task or job and he would complete the task. Tr. at 55. Once they knew the Individual and his work ethic, they knew that they did not have to supervise him closely to make sure the job would be finished properly. Tr. at 55. If the Individual was unsure of a task, he would ask for instruction. Tr. at 55. "[The Individual] would take the initiative to go above and beyond." Tr. at 56. The Individual was

dependable and honest. Tr. at 56. The supervisor had the authority to restrict the Individual's access to keys and certain jobs, if the Individual proved not to be honest or trustworthy, but he has not been restricted. Tr. at 57. The supervisor stated that the Individual appeared to be very sorry and guilty about the falsification. Tr. at 60. He believes that the falsification is assuaged by the fact that the Individual came forward on his own. Tr. at 60. The supervisor stated "[b]ut for somebody to put down some bad information, in my opinion, and to come back and try to correct it, that's being honest right there." Tr. at 62.

The Individual's current supervisor testified that he has known the Individual for approximately one year. Tr. at 98-99. He stated that the Individual is a hard worker. Tr. at 99. The Individual is honest with him about what work he has and has not completed. Tr. at 100. He stated the Individual is honest and upright. Tr. at 100. He follows through on what he says he is going to do. Tr. at 101. In addition, the Individual does the right thing, whether someone is monitoring him or not. Tr. at 101. For example, he wears all safety equipment required to complete a job, whether he is being supervised or not. Tr. at 101. The Individual is prompt. Tr. at 102. The Individual is always properly dressed and groomed for work, wearing a clean, pressed uniform, and being cleanly shaven. Tr. at 103.

E. The Individual's Co-Worker

The co-worker testified that he has known the Individual about four years. Tr. at 77. The co-worker is a member of the same armed force as the Individual and met the Individual when the co-worker rejoined his unit, which the Individual had joined while the co-worker was in Iraq. Tr. at 77. When the co-worker returned to his unit, he supervised and trained the Individual. Tr. at 78. They worked together every day during the Individual's training. Tr. at 79. He is a hard worker and somewhat more mature than other trainees. Tr. at 79. He presently sees the Individual every weekend for training. Tr. at 81.

The co-worker stated that he does not question the Individual's honesty, judgment, and reliability because of the dealings he has had with him. Tr. at 84. He testified that he checks up on the Individual occasionally. Tr. at 85. He said that the Individual's supervisors have spoken "very, very highly of him." Tr. at 86.

III. Standard of Review

A DOE administrative review proceeding under 10 C.F.R. Part 710 is not a criminal case, in which the burden is on the government to prove the defendant guilty beyond a reasonable doubt. In this type of proceeding, we apply a

different standard, which is designed to protect national security interests. A hearing is “for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization.” 10 C.F.R. § 710.21(b)(6). The burden is on the individual to come forward at the hearing with evidence to convince the DOE that granting or restoring his access authorization “would not endanger the common defense and security and would be clearly consistent with the national interest.” 10 C.F.R. § 710.27(d).

This standard implies that there is a strong presumption against the granting or restoring of a security clearance. See *Dep’t of Navy v. Egan*, 484 U.S. 518, 531 (1988) (the “clearly consistent with the interests of the national security test” for the granting of security clearances indicates that “security-clearance determinations should err, if they must, on the side of denials.”) *Dorfman v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990) (strong presumption against the issuance of a security clearance). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issue. *Personnel Security Hearing*, Case No. VSO-0002, 24 DOE ¶ 82,752 at 85,511 (1995).

Once a security concern has been found to exist, the individual has the burden of going forward with evidence to rebut, refute, explain, extenuate, or mitigate the allegations. *Personnel Security Hearings*, Case No. VSO-0005, 24 DOE ¶ 82,753 (1995), *aff’d*, 25 DOE ¶ 83,013 (1995). See 10 C.F.R. § 710.7(c).

IV. Criterion F Findings and Conclusions

According to the Adjudicative Guidelines, any failure to provide truthful and candid answers during the security clearance process is conduct that raises questions about an individual’s reliability, trustworthiness, and ability to protect classified information. See Adjudicative Guidelines, Guideline E ¶ 15.

A finding of derogatory information does not, however, end the evaluation of evidence concerning the Individual’s eligibility for access authorization. See *Personnel Security Hearing*, Case No. VSO-0244, 27 DOE ¶ 82,797, *aff’d* (OSA 1999); *Personnel Security Hearing*, Case No. VSO-0154, 26 DOE ¶ 82,794 (1997), *aff’d* *Personnel Security Review*, (Case No. VSA-0154), 27 DOE ¶ 83,008, *aff’d* (OSA 1998). In the end, like all OHA Hearing Officers, I must exercise my common sense judgment in determining whether an individual’s access authorization should be restored after considering the applicable factors prescribed in 10 C.F.R. § 710.7(c). Therefore I must consider whether the Individual has submitted sufficient evidence of mitigation to resolve the security concerns raised by his failure to honestly disclose his illegal drug use.

In a number of decisions, OHA Hearing Officers have considered the implications of falsifications. The factors considered in these cases include whether the individual came forward voluntarily to renounce his falsifications. *Compare Personnel Security Hearing*, Case No. VSO-0037, 25 DOE ¶ 82,778 (1995), *aff'd* (OSA 1996) (voluntary disclosure by the individual), *with Personnel Security Hearing*, Case No. VSO-0327, 28 DOE ¶ 83,005 (2000), *aff'd* (OSA 2000) (falsification discovered by DOE security). In addition, an OHA Hearing Officer must also consider the length of time the falsehood was maintained. *Compare Personnel Security Hearing*, Case No. VSO-0448, 28 DOE ¶ 82,816 (2001), *aff'd Personnel Security Review*, Case No. VSA-0448, (October 25, 2001) (11-month period of honesty not sufficient to mitigate four-year period of deception), *with Personnel Security Hearing*, Case No. VSO-0440, 28 DOE ¶ 82,807 (2001) *aff'd* (OSA 2001) (18 months of responsible, honest behavior sufficient evidence of reformation from dishonesty that spanned 6-months in duration); *Personnel Security Hearing*, Case No. VSO-0289, 27 DOE ¶ 82,823 (1999), *aff'd Personnel Security Review*, 27 DOE ¶ 83,025 (2000), *aff'd* (OSA 2000) (19 months not sufficient time to demonstrate rehabilitation for 12-year period of deception). Also, an OHA Hearing Officer must consider whether a pattern of falsification is evident and the amount of time that has transpired since the individual's admission. *See Personnel Security Hearing*, Case No. VSO-0327, 27 DOE ¶ 82,844, *aff'd* 28 DOE ¶ 83,005 (2000) *aff'd* (OSA 2000) (two QNSPs in 1990 and 1996 and information during a Personnel Security Interview in 1991 falsified, which came to light in 1996).

Ultimately, I must use my common sense judgment to determine whether the Individual's access authorization should be restored. In this case, I find that the Individual's falsifications are a serious matter. He deliberately falsified relevant and material information on two security forms at two government agencies, the DOD in 2005^{4/} and the DOE in 2007, and he lied to the OPM investigator in 2007. Although the Individual testified that he now understands the importance of being completely honest in his responses, the Individual's willingness to conceal information from the DOE in order to avoid an adverse consequence is an action that is unacceptable among access authorization holders. *See Personnel Security Hearing*, Case No. VSO-0013, 25 DOE ¶ 82,752, *aff'd* (OSA, 1995). The fact that the Individual came forward on his own accord to report the falsification is a positive factor that weighs in favor of his access authorization being restored. Weighing against restoring the Individual's access authorization are the following factors: (1) he maintained the falsification for 18 months while he has only been honest with the DOE for 10 months; (2) his falsifications are recent,

^{4/} The Individual's failure to provide truthful responses on his QNSP to the DOD falls within the ambit of Guideline E, the Guideline that corresponds to Criterion F and hence is an appropriate factor for me to evaluate in connection with the proceeding.

having occurred between December 2005 and June 2007; (3) he has shown a pattern of deception by falsifying two QNSPs and answers to an OPM investigator; (4) he admitted during the hearing that he did not disclose his drug usage on the QNSP because he thought he would not be granted an access authorization; and (5) during the period that the Individual maintained the falsehood, he was vulnerable to blackmail, pressure, or coercion. After considering all the evidence, both favorable and unfavorable, in a common-sense matter, I find that the Individual has failed to mitigate the security concerns raised by Criterion F.

V. Conclusion

As the foregoing indicates, the Individual has not resolved the Criterion F security concern cited in the Notification Letter. Therefore, I must conclude that the Individual has not shown that restoring his access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). Consequently, it is my decision that the Individual's access authorization should not be restored at this time. The parties may seek review of this decision by an Appeal Panel. 10 C.F.R. § 710.28(b)-(e).

Janet R. H. Fishman
Hearing Officer
Office of Hearings and Appeals

Date: Aug. 7, 2008